

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-CV-329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**PLAINTIFF STATE OF OKLAHOMA'S REPLY
TO "DEFENDANTS' REPOSE AND OBJECTION TO PLAINTIFF'S
MOTION FOR LEAVE TO EXPEDITE DISCOVERY"**

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), and in reply to "Defendants' Response and Objection to Plaintiff's Motion for Leave to Expedite Discovery" states as follows:

I. ARGUMENT

A. The State's Motion is Not an Attempt to Evade Rule 26

In an effort to divert the Court's attention from the issue at hand, the Poultry Integrator Defendants contend that the requested discovery is inappropriate inasmuch as there has yet to be a Rule 26 conference. While in the typical case, the Poultry Integrator Defendants are correct that discovery generally follows a Rule 26 conference, this is not a typical case. It is in a unique procedural posture, with the Poultry Integrator Defendants having sought to delay and to thwart its progress at every turn. First, while it filed its Complaint in June, 2005, the State withheld service in an effort to see if settlement talks with the Poultry Integrator Defendants might succeed. Second, the Poultry Integrator Defendants continue to maintain that discovery would

be "inappropriate" until there is a ruling on their motions to dismiss. Third, the Poultry Integrator Defendants moved to stay the proceedings during the four-month pendency of the State of Arkansas's unsuccessful effort to invoke the original jurisdiction of the United States Supreme Court. And fourth, the Poultry Integrator Defendants have sought to delay service of the 200+ third-party complaints they filed. Further, in a separate regulatory action, the Poultry Integrator Defendants have thwarted sampling by the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF"), while at the same time claiming in this proceeding that ODAFF has overseen, and even authorized, their improper waste disposal.

Against this backdrop of efforts by the Poultry Integrator Defendants to delay the progress of this case, the State can hardly be faulted in seeking expedited discovery prior to a Rule 26 conference.¹ Contrary to the Poultry Integrator Defendants' assertions, the State is not attempting an end-run on Rule 26² or to do discovery for some ulterior motive; rather, the State is simply trying to conduct otherwise routine environmental sampling -- sampling that occurs in environmental litigation all the time -- at the time most opportune for such sampling to occur.

B. The State's Motion Sufficiently Details the Requested Discovery

As explained in its motion, the State of Oklahoma seeks to collect samples of poultry waste, soil and water from poultry feeding operations owned or under contract to the Poultry Integrator Defendants. The specific protocol that will be followed is set forth in the attached Exhibit 1. For the Poultry Integrator Defendants to now feign ignorance of what the State seeks

¹ The Poultry Integrator Defendants' protestations about pre-mature discovery ring particularly hollow in light of the fact that the Poultry Integrator Defendants have peppered the State with broad-ranging open records requests in an effort to circumvent Rule 26. Compare, e.g., *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 fn. 10 (1975) ("The [Freedom of Information] Act is fundamentally designed to inform the public about agency action and not to benefit private litigants"); *Baldrige v. Shapiro*, 455 U.S. 345, 360 fn. 14 (1982) ("The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery").

² It is important to note that the State did in fact confer with the Poultry Integrator Defendants about its Motion prior to its filing, and the Poultry Integrator Defendants objected.

is disingenuous. Discovery of this sort is typical of the discovery conducted in virtually any environmental pollution case. Whether it be a nuclear plant, factory, chemical plant, oil refinery, or mine alleged to be causing pollution, securing samples is routine and necessary.

C. The State Has Demonstrated the Requisite Good Cause for the Requested Discovery

The Poultry Integrator Defendants have misstated the applicable legal standard. Courts have broad discretion in determining whether to allow for expedited discovery. *See Dimension Data North America, Inc. v. Netstar-1, Inc.*, 226 F.R.D. 528, 530 (E.D.N.C. 2005) ("Although specific standards for evaluating expedited discovery motions are not set out in the Federal Rules of Civil Procedure, the Rules provide that court with authority to direct expedited discovery in limited circumstances"). The standard against which courts should evaluate requests for expedited discovery is "good cause." *See, e.g., Dimension Data*, 226 F.R.D. at 531; *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002). "Good cause" equates to reasonableness under the circumstances. *See, e.g., Dimension Data*, 226 F.R.D. at 531 ("A standard based upon reasonableness or good cause, taking into account the totality of the circumstances, is more in keeping with discretion bestowed upon the court in the Federal Rules of Civil Procedure"). The *Notaro* approach urged by the Poultry Integrator Defendants has been largely abandoned. As explained in *Semitool*:

The Court rejects the rigid *Notaro* standard and is persuaded that the more flexible good cause standard applied in *Yokohama Tire, supra*, and other cases is the appropriate standard under Rule 26(d). It does so for several reasons. First, *Notaro* was decided before the 1993 amendment to Rule 26. . . . The timing of discovery prescribed by Rule 26(d) focuses not on protecting the unwary and unrepresented defendant, but rather on orderly case management. The *Notaro* factors would not accommodate expedited discovery in circumstances even where such discovery would facilitate case management and expedite the case with little or no burden to the defendant simply because the plaintiff would not suffer "irreparable injury." Such a result is inconsistent not only with Rule 26(d), which

requires the Court to consider, *inter alia*, "the interests of justice," but also the overarching mandate of Rule 1 which requires that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

208 F.R.D. at 275-76. For the reasons that follow, it is evident that the "totality of the circumstances" support granting the State's motion for expedited discovery, and thus the requisite "good cause" is established.

The State seeks sampling of soil, waste, and water at the waste disposal locations, and it seeks expedited sampling to ensure that the evidence collected accurately represents the releases of pollutants during the primary period of land disposal this spring. The simple fact of the matter is that the spring months provide one of the most opportune times for the sampling the State seeks to conduct. This is for two basic reasons. First, it is the time-frame when the greatest amount of litter spreading occurs. And second, it is the time-frame when the Illinois River Watershed ("IRW") has some of its highest levels of rainfall. Contrary to the Poultry Integrator Defendants' assertions, these reasons are borne out by the facts as outlined below.

1. The State's Request to Sample in the Spring is Reasonable and Necessary.

The Poultry Integrator Defendants' premise their opposition to the State's request on their inexplicable belief that waste disposal, significant rainfall and outdoor recreation do not occur in the spring. They support this position by referencing general fertilization guides, rainfall records indicating that it rains on average 0.3 inches more in the fall, and two travel brochures. A review of more relevant documents demonstrates the fallacy of their position.

- The Poultry Integrator Defendants deny that most land application of poultry waste occurs in the spring and early summer. *See* Defendants' Response, p. 17. However, according to researchers "[o]ver one million tons of litter are generated each year at over 1,000 separate sites in northwest Arkansas alone. . . . Growers traditionally clean

out their production houses during a two to three month period in the Spring prior to vigorous pasture growth.” *See* Exhibit 2, Section 1.1. Further, while land application occurs throughout the year, ODAFF records indicate the majority of land application occurs in the spring and early summer. *See* Exhibit 3.

- The Poultry Integrator Defendants dispute that significant rainfall occurs in the spring; however, the documents they cite do not support that conclusion for the three counties in the Oklahoma portion of the IRW. *See* Defendants’ Response, p. 18. For example, the Oklahoma Climatological Survey document they cite indicates that the highest average rainfall for Adair and Cherokee Counties has historically occurred in May. *See* Defendants’ Response, Exhibit 18. In Delaware County, May and September are the highest average rainfall months with 5.4 and 5.6 inches, respectively. *Id.*; *See also*, Exhibit 4 (Showing high average precipitation within the IRW).
- Recreational use of the IRW through kayaking and canoeing typically picks up in March with the heaviest use beginning in May and continuing through September. *See* Exhibit 5, Compilation of Monthly User Fees Tallies 2003-2005 (March 16, 2006). Thus, heavy recreational use does, in fact, coincide with the Poultry Integrator Defendants’ spring waste disposal.

The fact that the ODAFF sought testing in the fall does not in anyway undermine these facts. As the Poultry Integrator Defendants are aware, the Department has been attempting to sample their waste application sites since the spring 2005, prior to the filing of this lawsuit, but the Poultry Integrator Defendants have opposed these efforts in state court. In any event, the State does not maintain that sampling during other parts of the year is not important and relevant;

only that it is imperative that spring sampling be conducted now for the reasons cited above and in its Motion.

2. The Existence of Threats to Human Health and the Environment Further Supports the State's Request.

The Poultry Integrator Defendants assert that state agencies have concluded that their disposal of poultry waste does not pose a "hazard to human health." *See* Defendants' Response, pp. 14-15. Nothing could be further from the truth. In fact, the Oklahoma environmental agencies' 2005 annual report to the Legislature states that "[b]ecause the majority of the phosphorus and other pollutants of concern, such as bacteria and sediment, stem from nonpoint source runoff, efforts to restore the Scenic Rivers are obstructed by the lack of a similar commitment on the part of the poultry integrator companies that operate in Scenic River watersheds to address the single largest contributor of nonpoint source pollution – surplus poultry litter generated at their farms." *See* Exhibit 6, p. 7.

While they do not appear to dispute the fact that pollutants such as phosphorus, nitrogen, arsenic, zinc, copper, and bacteria are released from the land disposal sites on which poultry waste is applied, the Poultry Integrator Defendants attempt to argue that the State's allegations with regard to the hazards posed by such releases are not justified. To the contrary, as set forth in the State's Motion, the hazards presented by the Poultry Integrator Defendants' waste disposal practices are well documented in scientific research, agency reports, and university studies. For example:

- Pollutants released from concentrated animal feeding operations are transported by "surface runoff, air transport and redeposition, and groundwater flow. Nutrients, pathogenic organisms, hormones and metals may easily reach waterbodies via these means." *See* Exhibit 7, Section 1, p. 4.

- The majority of published research shows that most phosphorus in surface applied manure is lost in the first runoff event. *See* Exhibit 8, p. 2201. In the IRW, “[s]ubbasins with the greatest densities of poultry houses, and hence high estimated soil phosphorus levels, generally delivered the greatest quantities of nutrients to the Illinois River and its tributaries.” *See* Exhibit 9, p. 233.
- State environmental agencies report that “[u]nfortunately, all of the water quality improvements realized at base flow conditions are promptly erased when rainfall in the watersheds causes runoff of phosphorus exposed to the elements. The most significant source of this phosphorus is surface-applied poultry litter.” *See* Exhibit 6, p. 3. The United States Geological Survey has found that “[t]he annual average (1997-2001) phosphorus load entering Lake Tenkiller was about 577,000 pounds per year. More than 86 percent of the phosphorus load was transported to the lake by runoff.” *See* Exhibit 10, p. 21.
- In addition to nutrients, the U.S. Environmental Protection Agency reports that animal manure “contains potentially pathogenic microorganisms” and such pathogens “are released into the watershed environment routinely during the land application of waste.” *See* Exhibit 7, Section 1, p. 3. Further, “[m]etals used as feed supplements to promote livestock growth may degrade the quality of the land to which waste is applied. Adverse environmental effects may result when waste containing metals is released into the watershed.” *Id* at p. 4.
- Poultry Integrator Defendants allege that background concentrations of bacteria can be “very high” and that “not all bacteria are necessarily ‘disease-causing,’” *see* Defendants’ Response, pp. 15-16, despite the fact that one of the articles they

cite actually states that “[a]nimal manures can contain numerous pathogens . . . that are potentially harmful to humans.” *Id.* Defendants’ Exhibit 12, p. 413. It further states that fecal bacteria runoff samples frequently exceeded state standards for body contact, and that “maximum” fecal streptococcus and fecal coliform concentrations were measured in a runoff event occurring one day after poultry litter application. *Id.* at 421.

- Furthermore, according to the EPA, concentrated animal feeding operations are “a major source of pathogenic contamination in most watersheds.” *See* Exhibit 7, Section 4, p. 28. Pathogen levels may be “quite high” in animal manure and “may present a significant risk to health.” *Id.* at p. 24. After pathogens runoff from the animal feeding operation, “[r]ecreational use of the streams may then bring people into direct exposure to large numbers of potentially pathogenic microorganisms. Several disease outbreaks have been associated with manure contamination of water or food that has been contacted by manure.” *Id.*
- All three scenic rivers in the IRW are failing to meet federally-approved water quality standards for private and public water supply, aesthetics and primary body contact recreation. The Primary Body Contact standard is being violated due to high levels of Fecal Coliform, *E. coli* and Enterococci. *See* Exhibit 6, p. 4. The Poultry Integrator Defendants cite a Sequoyah County Times article for the proposition that potentially carcinogenic disinfection byproducts caused by eutrophication are not a problem for public water supplies at Lake Tenkiller, but official records show that the referenced water supply, Gore PWA, exceeded haloacetic acid standards three times in 2005. *See* Exhibit 11.

- Animal manures generated by large scale animal production are a significant source of bacteria loading to surface and groundwater in the Ozark Plateau Region and a large portion of that animal production occurs in the IRW. *See* Exhibit 12. Certain springs and the Illinois River itself are reported to contain fecal bacteria at levels exceeding primary body contact standards. *See e.g.*, Plaintiff's Motion to Expedite, Exhibit 3 at pp. 1279, 1283. The researchers concluded that "[t]he survival of fecal coliform bacteria, including *E. coli*, in these environments over extended periods highlights a continuing human health hazard associated with consumption of nontreated water from wells, springs, and streams from the mantled karst of the Ozark region." *Id.* at 1286.

In an environmental case of this sort, sampling of soil, waste and water routinely occurs. Given the timing of the disposal and likely rainfall in the region, this limited discovery should be allowed on an expedited basis.

D. The State's Sampling Protocols Address Any Biosecurity Concerns

The Poultry Integrator Defendants also object to the proposed sampling because of biosecurity. The State has already stated it will adhere to all applicable standards and procedures promulgated by the state agricultural authorities governing biosecurity.³ ODAFF has developed biosecurity protocols that are equivalent to the programs of Tyson Chicken, Inc., George's, Inc., Cobb-Vantress, Inc., and Simmons Foods. *See* Defendants' Response, Exhibit 22 Affidavit of State Veterinarian, Becky Brewer, D.V.M. The Poultry Integrator Defendants have seen an ODAFF protocol previously and do not allege such standards or procedures are inadequate. *Id.* at Exhibit 22, p. 18 (Copy of ODAFF biosecurity protocol). Moreover, while the State fully

³ ODAFF has jurisdiction over animal disease prevention. Okla. Const., Art. 6, § 31; 2 Okla. Stat. § 6-2.

intends to follow the ODAFF protocols, the Poultry Integrator Defendants and their contract growers do not appear to act in accordance with their own representations. For example, on page 23 of their Response, the Poultry Integrator Defendants assert that anyone other than a poultry farmer or company representative is prohibited from entering a poultry house; however, persons other than farmers and company representatives have been allowed to access poultry houses. *See* Exhibit 13 (Daily Oklahoman photograph dated February 2, 2006 showing Peterson poultry grower Bev Saunders and a photographer inside a poultry house.)

II. CONCLUSION

WHEREFORE, premises considered, the State's request for limited, expedited discovery should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic filing to the following ECF registrants:

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